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No. 79-422

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOSEPH TAIBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment of the court of appeals (Pet. App. 42-43) is not reported. The opinion of the district court (Pet. App. 44-60) is reported at 446 F. Supp. 1142.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1978. The petition for a writ of certiorari was filed on September 4, 1979, and is therefore substantially out of time under Rule 22(2) of this Court. The jurisidction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether reasonable suspicion existed justifying a stop and frisk of petitioner.

2. Whether, in the circumstances of this case, petitioner voluntarily consented to the search of his suitcase.

3. Whether the court properly admitted into evidence cocaine discovered when it fell out of petitioner's jacket.

4. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a special parole term of ten years, and was fined $5,000 (Pet. 2). The court of appeals affirmed (Pet. App. 42-43).

1. The evidence pertaining to petitioner's detention and the search of his suitcase and jacket is fully set out in the opinion of the district court (Pet. App. 44-54). Briefly, it showed that DEA agents in New York City received information that petitioner, a suspected drug trafficker, would be arriving at Kennedy International Airport on an airline ticket issued in another person's name and that he was carrying approximately $30,000 in cash. Accordingly, the agents undertook a surveillance of petitioner upon his arrival (Pet. App. 44-45). Petitioner was met by Michael Tullo and gave Tullo his baggage claim ticket. The two men then separated and pretended not to know each other. After Tullo claimed petitioner's suitcase, the two men met at Tullo's car in the airport parking lot (*id.* at 45-46). The agents approached the car, identified themselves and asked the men to get out of the vehicle. Neither man responded, and the agents observed

petitioner attempt to stuff his jacket under the car's front seat. Two of the three agents then drew their weapons and shouted at the men, after which petitioner and Tullo emerged from the car (*id.* at 46), and the agents put away their revolvers (*id.* at 54). The men were frisked for weapons and produced identification (*id.* at 46-47).

Petitioner consented to Agent Huber's request for permission to search his suitcase. In the course of removing the suitcase from the car, Agent Huber also picked up petitioner's jacket from the floor of the car; as he did so, a bag containing white powder fell from a pocket (*id.* at 47). Huber then searched the suitcase, in which he found a bag containing a white powder (later determined to be lactose) and a box labelled "Drug and Narcotics Identification Kit" (*ibid.*). Petitioner was then given *Miranda* warnings, and he agreed to accompany the agents to the DEA office. There a field test revealed that the bag that fell from petitioner's jacket contained cocaine.[1] Petitioner and Tullo were placed under arrest. Petitioner consented again to a second search of his suitcase (*id.* at 47-48). Additional narcotics paraphernalia were discovered in the suitcase, and $42,000 in cash was found hidden in petitioner's jacket (*id.* at 48).

2. The district court held that the facts observed by the agents provided them with a reasonable suspicion that petitioner was engaged in narcotics trafficking sufficient to justify the stop and frisk of petitioner (Pet. App. 50-52). After considering the totality of the circumstances, including the fact that the stop occurred in an open public area, that the agents' guns had been

[1]Testimony at trial indicated that the 40 grams of cocaine found in the jacket contained approximately 800 dosage units and was worth approximately $2,250 (Tr. 84-86).

put away, and that the request was made in a conversational tone of voice without promises or threats, the court found that petitioner voluntarily consented to the search of his suitcase (*id.* at 52-54). The court also found, however, that the consent did not authorize a search of petitioner's jacket and that the discovery of the cocaine hidden in the jacket was not inadvertent. Nevertheless, it found that the cocaine would ultimately have been discovered, because the lawful search of the suitcase led to the discovery of materials that gave rise to probable cause to believe that the car contained contraband. The court reasoned that a proper search of the car could have been conducted at that point, given its location in a public place, and the cocaine in the jacket inevitably would have been discovered (*id.* at 54-57). Accordingly, the court denied petitioner's motion to suppress (*id.* at 57). The court of appeals affirmed "substantially for the reasons" given by the district court (*id.* at 43).

ARGUMENT

At the outset, we submit that the Court should not accept this case for review because of the substantial untimeliness of the petition. The judgment of the court of appeals was entered on November 2, 1978, and the petition was therefore due for filing on December 2, 1978. It was not filed until September 4, 1979, and was therefore more than nine months out of time. With the exception of a patently insubstantial attack on the sufficiency of the evidence (see point 4, *infra*), petitioner's contentions all attack the lawfulness of the search leading to the discovery of contraband and other evidence of petitioner's guilt. Since these contentions

have no bearing upon the issue of guilt or innocence, we submit that the Court should not consider them when they are first presented in a petition that is so far out of time. To entertain them now, when the judgment of conviction has long since become final, would circumvent the policies restricting collateral attacks upon final judgments on the basis of Fourth Amendment exclusionary rule claims. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

1. Petitioner contends (Pet. 17-23) that his initial detention and frisk in the airport parking lot was illegal. This contention is without merit. The DEA agents knew that petitioner was travelling under an alias, carrying a large amount of cash, and that he was already under suspicion of involvement in narcotics trafficking. Petitioner's conduct in the airport in giving his baggage claim check to Tullo and then pretending not to know him until their rendezvous in the parking lot further added to the agents' suspicion that illicit drug activities were afoot. These "specific and articulable facts" (see *Terry* v. *Ohio* 392 U.S. 1, 21 (1968)) clearly establish that the agents had a reasonable suspicion of criminal activity sufficient to justify a brief stop, as the district court found (Pet. App. 51-52). See *United States* v. *Oates*, 560 F. 2d 45, 59 (2d Cir. 1977).[2] The fact that weapons were not found during the frisk (see Pet. 20) does not suggest that the investigative stop was improper, nor did it prevent the agents from requesting petitioner's consent to search.

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[2]Petitioner suggests that this case is distinguishable from *Terry* and *Oates* because petitioner was required to place his hands on top of the car during the frisk (Pet. 20) and that this conduct, coupled with the agents' action in ordering petitioner out of the car with guns drawn, constitutes an arrest (Pet. 21). This suggestion is without foundation. The right of a policemen to stop and frisk a suspect necessarily includes the right to order the suspect to comply if he does not cooperate willingly. See *Adams* v. *Williams*, 407 U.S. 143, 147 (1972); *Terry* v. *Ohio*, *supra*, 392 U.S. at 32 (Harlan, J., concurring).

2. Petitioner concedes (Pet. 23, 27) that the district court properly considered the "totality of the circumstances" under *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), in determining that he voluntarily consented to the search of his suitcase. However, petitioner contends (Pet. 23-30) that the district court's conclusion based on these circumstances was erroneous. Since both courts below have agreed on the factual determination that the consent was voluntarily given, further review by this Court is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967). Moreover, the court's finding is amply supported by the record. No threats or promises were made to induce consent, and the setting, a public parking lot, was not inherently coercive (Pet. App. 52-54). Petitioner suggests (Pet. 24, 30) that coercion must be implied because petitioner was carrying contraband and thus would not have consented to be searched voluntarily. Such a per se rule, however, would virtually eliminate the utility of consent searches by police officers, even though this Court has encouraged the use of that technique. See *Schneckloth*, *supra*, 412 U.S. at 227-228.

3. Petitioner next contends (Pet. 31-36) that the district court erred in ruling that the cocaine discovered after it fell out of petitioner's jacket was admissible under the "inevitable discovery" doctrine. Agent Huber picked up the jacket after receiving petitioner's consent to a search of his suitcase, but before conducting the search. The district court found that petitioner had not consented to a search of his jacket and that the cocaine was not admissible under the "plain view" doctrine because the act of picking up the jacket was not inadvertent (Pet. App. 54-55). The court found, however, that the evidence discovered in the suitcase search

furnished probable cause to believe that narcotics were hidden, justifying an immediate search of the car including petitioner's jacket (*id.* at 56-57). The cocaine in the jacket would inevitably have been found, and thus it was held to be admissible. *United States* v. *Jarvis*, 560 F. 2d 494 (2d Cir. 1977), cert. denied, 435 U.S. 934 (1978).

A conflict in the circuits exists concerning the validity of the inevitable discovery doctrine.[3] The Court has declined to resolve that conflict in the past,[4] and we do not believe that this case presents a suitable vehicle for addressing the issue. It is our submission that probable cause existed to search petitioner's jacket at the time the cocaine was discovered, prior to the search of his suitcase. If we are correct, there would be no occasion to decide whether the search was sustainable on inevitable discovery grounds. In addition to the other information that led the agents to suspect narcotics activity (the use of an alias, carrying over $30,000 in cash, the identification of petitioner as a suspected drug trafficker, and the suspicious conduct of petitioner and Tullo in the airport and parking lot), Agent Sears saw petitioner attempt to conceal his jacket under the front seat of the car when the agents approached the vehicle (Pet. App. 46). Sears told Agent Huber what he had observed before Huber picked up the jacket (*id.* at 47, 55). While an innocent explanation of the attempted concealment of the jacket can be imagined, it was nevertheless a highly suspicious action, which, when considered together with the other facts known to the agents, gave them probable

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[3]Compare *United States* v. *Jarvis*, *supra*, *United States ex rel. Owens* v. *Twomey*, 508 F. 2d 858 (7th Cir. 1974), and *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914, 917-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975) with *United States* v. *Houltin*, 525 F. 2d 943, 949 (5th Cir. 1976).

[4]See, *e.g.*, *Fitzpatrick* v. *New York*, 414 U.S. 1050 (1974).

cause to believe that weapons or contraband were present in the jacket or car, thus justifying an immediate search. *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970).

4. Petitioner finally contends (Pet. 37-41) that the evidence failed to establish that he possessed cocaine with the intent to distribute as required by 21 U.S.C. 841(a)(1), but at most showed that he possessed the cocaine solely for his personal use. This contention is without merit.

Agent Sears testified that the cocaine contained approximately 800 dosage units with a total street value of $2,250 (Tr. 84-86). This evidence of the magnitude of the resale value may alone be sufficient to sustain an inference of intent to distribute. See *United States* v. *Ramirez-Rodriquez*, 552 F. 2d 883, 885 (9th Cir. 1977); *United States* v. *Mather*, 465 F. 2d 1035, 1037 (5th Cir.), cert. denied, 409 U.S. 1085 (1972). Moreover, petitioner's possession of $42,000 in cash, the discovery of two narcotics identification kits and other narcotics implements in his suitcase, and his possession of approximately 295 grams of lactose, a cutting agent for narcotics, all support the court of appeals' holding that the evidence was sufficient (Pet. App. 43). See *United States* v. *Reese*, 561 F. 2d 894, 897 (D.C. Cir. 1977); *United States* v. *Ramirez-Rodriquez*, *supra*.[5]

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[5]Petitioner's reliance (Pet. 37) on *United States* v. *Oropeza*, 564 F. 2d 316 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978), is misplaced. There the court concluded that no showing had been made that the heroin was within the defendant's exclusive dominion and control. 564 F. 2d at 322-323.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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